

NO. 46159-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES TEWEE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John F. Nichols, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in finding that appellant was under community custody at the time of the current offense.

2. The sentencing court erred in adding a point to appellant's offender score under RCW 9.94A.525(19).

Issue pertaining to assignments of error

In 2008, appellant was convicted of two misdemeanors and placed on probation under the supervision of the Department of Corrections. While he was on probation he committed the current offense. Where the probation ordered in 2008 was not community custody under the statutory definitions in effect at the time, did the sentencing court err in adding a point to appellant's offender score for committing the current offense while under community custody?

B. STATEMENT OF THE CASE

In 2011, Appellant Charles Tewee was convicted of one count of first degree child molestation committed between January 1, 2010, and February 28, 2010. CP 3-4, 7. The court calculated his offender score as 9 and imposed an exceptional sentence based on an aggravating factor found by the jury. Supp. CP (Felony Judgment and Sentence, Sub. No. 98, filed 8/31/11).

Tewee appealed his conviction and sentence. This Court affirmed the conviction but held that the trial court improperly found that Tewee's Oregon conviction for unauthorized vehicle use to be comparable to a Washington conviction for taking a motor vehicle without permission. CP 12-16. This Court remanded for a full resentencing, noting that the trial court had discretion to consider issues not raised in Tewee's initial sentencing or on appeal. CP 16.

On remand, the State argued and the court found that Tewee's Oregon conviction was comparable to a Washington conviction for second degree theft. 1RP 7; 2RP 7. Over defense objection that such a comparability determination was precluded by the Court of Appeals' decision, the court again included the Oregon conviction in Tewee's offender score. 1RP 11.

Defense counsel also argued that an Oregon conviction for possession of a controlled substance should not be included in the offender score. Counsel pointed out that that conviction was based on a no contest plea, thus the underlying facts were not established. Counsel argued that the court was precluded from making factual findings to determine comparability. CP 36-50; 1RP 4-6. The court rejected that argument as well, ruling that because Tewee's plea statement indicates that the crime

could be proved beyond a reasonable doubt, the conviction should count in the offender score. 2RP 6-7.

At the initial hearing on remand, the State suggested that Tewee might have been on community custody for two counts of fourth degree assault at the time the current offense was committed, in which case a point should be added to Tewee's offender score. 1RP 3-4. The court continued the hearing to allow the parties to research that issue. 1RP 8.

When the re-sentencing hearing resumed, the court noted that the State was requesting an extra point to Tewee's offender score based on his probation on charges of fourth degree assault. 2RP 4. The State's argument was based on statutory definitions of "offender" and "community custody" which include misdemeanor probationers, which it argued were in effect at the time of Tewee's offense. 2RP 5, 11-12. Defense counsel argued that Tewee was not placed on community custody for his fourth degree assault convictions under the applicable statutes, and therefore there was no basis to add a community custody point to his offender score for the current offense. 2RP 13.

The court entered an Order Denying Defendant's Sentencing Motions, ruling that the Oregon conviction for unlawful use of a motor vehicle was comparable to a Washington conviction for second degree theft, denying the motion to exclude the Oregon conviction for possession

of a controlled substance, and ruling that a point would be added to the offender score because the current offense was committed while Tewee was on probation from a 2008 misdemeanor conviction. CP 70-71.

The court calculated Tewee's offender score as 10 and re-imposed the same exceptional sentence of 220 months to life. CP 77-78. Tewee filed this timely appeal. CP 72.

C. ARGUMENT

THE COURT ERRED IN ADDING A POINT TO TEWEE'S OFFENDER SCORE BECAUSE TEWEE WAS NOT UNDER COMMUNITY CUSTODY WHEN THE OFFENSE WAS COMMITTED.

Interpretation of the Sentencing Reform Act is a question of law that this Court reviews de novo. State v. Crawford, 164 Wn. App. 617, 622, 267 P.3d 365 (2011). Under the SRA, if the present conviction is for an offense committed while the offender was under community custody, the sentencing court must add one point to the offender score. RCW 9.94A.525(19). The issue here is whether Tewee was "under community custody" at the time he committed the current offense.

On December 24, 2008, Tewee was convicted of two counts of fourth degree assault, which are misdemeanor offenses. CP 91. The court sentenced Tewee to 365 days in jail on each offense, to be served consecutively, but it suspended 640 days of the sentence for 48 months.

Supp. CP (Sub. No. 88, Memorandum Regarding Establishing the Defendant's Offender Score (filed 7/1/11), Attached "Findings of Fact, Conclusions of Law and Judgment and Sentence" in Clark County Cause No. 08-1-01988-8). During his probation Tewee was under the supervision of a community corrections officer of the Department of Corrections. Id.

Tewee was found to have committed the current offense in January or February 2010, while he was on probation for the fourth degree assault convictions. CP 75. The court below concluded that this probation was community custody within the meaning of RCW 9.94A.525(19) and added a point to Tewee's offender score.

The SRA defines "community custody" as "that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department." RCW 9.94A.030(5). While this definition has not changed since Tewee was sentenced on the fourth degree assault convictions, the definition of an "offender" to whom this definition applies has been expanded.

Under the sentencing statute as currently enacted, a misdemeanor or gross misdemeanor under probation ordered by superior court is



considered to be on community custody. RCW 9.94A.030(34)<sup>1</sup>. The statutory definitions in effect when Tewee was placed on probation did not treat probation for a misdemeanor conviction as community custody, however. At the time of Tewee’s 2008 sentencing, an “offender” was “a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110....” Former RCW 9.94A.030(31) (2008).

Because fourth degree assault is a misdemeanor, not a felony, Tewee was not an “offender” and the 2008 sentence did not impose a term of community custody. Tewee was sentenced to probation, and not community custody, and the extra point provision of RCW 9.94A.525(19) does not apply.

#### D. CONCLUSION

The court miscalculated Tewee’s offender score, and the case should be remanded for resentencing.

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<sup>1</sup> “(34) “Offender” means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. In addition, for the purpose of community custody requirements under this chapter, “offender” also means a misdemeanant or gross misdemeanant probationer ordered by a superior court to probation pursuant to RCW 9.92.060, 9.95.204, or 9.95.210 and supervised by the department pursuant to RCW 9.94A.501 and 9.94A.5011. Throughout this chapter, the terms “offender” and “defendant” are used interchangeably.”

DATED December 3, 2014.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Catherine E. Glinski", written in a cursive style.

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CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Supplemental Designation of Clerk's Papers in *State v. Charles Tewee*, Cause No. 46159-5-II as follows:

Charles Tewee DOC# 983694  
Monroe Corrections Center  
PO Box 777  
Monroe, WA 98272

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
December 3, 2014